Fazarudin bin Ibrahim v Parkson Corp Sdn Bhd (No 2)

HIGH COURT (JOHOR BAHRU) — ORIGINATING MOTION NO 25-15 OF 1994
ABDUL MALIK ISHAK J
20 OCTOBER 1999

Civil Procedure *— Functus officio — Application to assess damages for loss of use of trade mark — Earlier application to expunge registration of trade mark dismissed — Application for assessment of damages ancillary to earlier application — Whether court had jurisdiction to award or assess damages*

The applicant filed a summons-in-chambers (encl 38) for orders, inter alia, that the court to assess damages incurred by him for the loss of use of the 'ZIG ZAG' trade mark and that the respondent be ordered to pay the damages as assessed by the court to the applicant. The applicant deposed that on 7 July 1994, he obtained a trade description order. By way of a notice of motion (encl 10) the respondent sought for orders that they be at liberty to, inter alia, apply to expunge the registration of the trade mark. On 23 October 1996, the court dismissed encl 10. Enclosure 38 was a consequential order for assessment of damages which the applicant sought as an offshoot of the order of the court dated 23 October 1996. The applicant deposed that the respondent had profited from the use of 'ZIG ZAG' trade mark since 1987. The respondent submitted that the court did not have the jurisdiction to award damages and/or assessment of damages as it was functious officio in that the matter had been fully concluded.

Held, allowing the application:

(1) It was wrong to argue that the written judgment dated 23 October 1996 was all encompassing and covered encl 38. On the contrary, that written judgment revolved entirely on encl 10. The application in encl 38 was simply for an order that damages be assessed in favour of the applicant and this was never decided in the written judgment dated 23 October 1996. That being the case, the court was still free to consider encl 38 (see p 693B–F).

(2) Enclosures 10 and 38 were far apart from one another and totally different in its scope and ambit. The principle of functious officio should not be invoked to deprive the applicant of his legal right to seek damages against the recalcitrant respondent. The applicant was not seeking to vary the order of the court dated 23 October 1996; on the contrary he was merely seeking an ancillary order for damages to be assessed in his favour in encl 38 (see p 695E–F).

(3) The order of the court dated 23 October 1996 did not adjudicate on encl 38 and so the matter between the two parties in so far as

encl 38 was concerned had not been adjudicated by a court of competent jurisdiction. That being the case, the court was thus empowered to hear encl 38. The applicant was entitled to succeed in his summons-in-chambers in encl 38 and the court gave judgment to him in regard to the whole of encl 38 with costs (see p 704E–F).

[Bahasa Malaysia summary

Pemohon telah memfailkan saman-dalam-kamar (lampiran 38) untuk perintah, antara lain, bahawa mahkamah menaksirkan kerugian yang dialami olehnya untuk kehilangan penggunaan tanda niaga 'ZIG ZAG' dan bahawa responden diarahkan untuk membayar ganti rugi yang ditaksirkan oleh mahkamah kepada pemohon. Pemohon mendeposkan bahawa pada 7 Julai 1994 beliau telah memperolehi perintah perihal dagangan. Melalui notis usul (lampiran 10), responden memohon untuk perintah bahawa mereka diberi kebebasan, antara lain, memohon untuk membatalkan pendaftaran tanda niaga tersebut. Pada 23 Oktober 1996, mahkamah telah menolak lampiran 10. Lampiran 38 adalah perintah akibat untuk penaksiran ganti rugi di mana pemohon memohon sebagai sampingan perintah mahkamah bertarikh 23 Oktober 1996. Pemohon telah mendeposkan bahawa responden telah mengaut keuntungan daripada penggunaan tanda niaga 'ZIG ZAG' sejak 1987. Responden telah menghujahkan bahawa mahkamah tidak mempunyai bidang kuasa untuk mengaward ganti rugi dan/atau menaksirkan ganti rugi kerana ia telah functus officio di mana perkara tersebut telah disimpulkan sepenuhnya.

Diputuskan, membenarkan permohonan tersebut:

(1) Adalah salah untuk menghujahkan bahawa penghakiman bertulis bertarikh 23 Oktober 1996 adalah lengkap dan meliputi lampiran 38. Sebaliknya, penghakiman bertulis tersebut berkisarkan sepenuhnya lampiran 10. Permohonan di dalam lampiran 38 hanyalah untuk perintah bahawa ganti rugi ditaksirkan di pihak pemohon dan ini tidak pernah diputuskan di dalam penghakiman bertulis bertarikh 23 Oktober 1996. Memandangkan keadaan adalah sedemikian, mahkamah bebas untuk mempertimbangkan lampiran 38 (lihat ms 693B–F).

(2) Lampiran 10 dan 38 adalah jauh sekali dari satu sama lain dan berbeza sama sekali dari segi skop dan ruang lingkup. Prinsip functus offficio tidak sepatutnya dibangkitkan untuk merampas hak pemohon akan hak undang-undangnya untuk mendapatkan ganti rugi terhadap responden yang degil. Pemohon bukanlah meminta untuk mengubah perintah mahkamah bertarikh 23 Oktober 1996; sebaliknya beliau hanya memohon perintah sampingan untuk ganti rugi ditaksirkan di pihaknya di dalam lampiran 38 (lihat ms 695E–F).

(3) Perintah mahkamah bertarikh 23 Oktober 1996 tidak memutuskan lampiran 38 dan perkara antara kedua-dua pihak sejauh ia berkenaan dengan lampiran 38 belum lagi diputuskan oleh mahkamah yang mempunyai bidang kuasa yang kompeten. Memandangkan keadaan adalah sedemikian, mahkamah diberi kuasa untuk mendengar lampiran 38. Pemohon berhak untuk berjaya di dalam saman-dalam-kamarnya di dalam lampiran 38 dan mahkamah memberikan penghakiman dengan kos kepadanya berkenaan dengan keseluruhan lampiran 38 (lihat ms 704E–F).]

Notes

For cases on functus officio, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1894–1906.

Cases referred to

Arab Malaysian Finance Bhd v Badiaddin bin Mohd Mahidin & Anor [1996] 3 MLJ 621 (refd)

Ashmore v Corp of Lloyd's (No 1) [1992] 1 WLR 446; [1992] 2 All ER 486 (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

B Sunley & Co Ltd v Cunard White Star Ltd [1940] 1 KB 740; [1940] 2 All ER 97 (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Chaplin v Hicks [1911] 2 KB 786 (refd)

Cho Heng Rice Vermicelli Factory Co Ltd v Rifetra Sdn Bhd [1997] 2 AMR 1767 (refd)

Coenen v Payne & Anor, Payne v Coenen [1974] 2 All ER 1109 (refd)

Edison, The [1932] P 52 (refd)

Fazaruddin bin Ibrahim v Parkson Corp Sdn Bhd [1997] 4 MLJ 360; [1997] 2 CLJ 863; [1997] 2 AMR 1197 (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)

MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)

Polskie, etc v Electric Furnace Co Ltd [1956] 2 All ER 306 (refd)

Robinson v Harman (1848) 1 Ex 850 (refd)

Sally Wertheim v Chicoutimi Pulp Co [1911] AC 301 (refd)

Simpson v The London & North Western Railway Co [1876] 1 QB 274 (refd)

Tilling v Whiteman [1980] AC 1; [1979] 1 All ER 737 (refd)

United Asian Bank Bhd v Elgi Marka Sdn Bhd [1995] 1 MLJ 301 (refd)

Legislation referred to

Rules of the High Court 1980 O 33 r 2
Rules of the Supreme Court O 33 r 4(2) [UK]

M Nathan (*Brian Komathi* with him) (*Brian Komathi & Partners*) for the applicant.

DP Naban (*Lee and Hishammuddin*) for the respondent.

Abdul Malik Ishak J: This was a summons in chambers filed by the applicant for the following orders:

(1) that the court to assess both the general and special damages incurred by the applicant including damages for the loss of use of the 'ZIG ZAG' trade mark;

(2) that the respondent to provide a detailed statement of accounts pertaining to the profits which the respondent obtained for the use of the 'ZIG ZAG' trade mark and those profits be ordered to be paid to the applicant;

(3) that the court to assess other general and special damages incurred by the applicant as a result of the use of the 'ZIG ZAG' trade mark by the respondent;

(4) that the respondent be ordered to pay both the general and special damages as assessed by the court to the applicant.

and it was supported by an affidavit of Fazaruddin bin Ibrahim ('Fazaruddin') as seen in encl 37. Fazaruddin deposed that affidavit in his capacity as the manager and the owner of a business styled as Perniagaan Fatama with an address at No 12, Jalan Serampang, Taman Pelangi, 80400 Johor Bahru, and he too deposed the same affidavit in his capacity as the registered proprietor of the 'ZIZ ZAG' trade mark under the Trade Marks Act 1976. Fazaruddin deposed that on 7 July 1994 he obtained a trade description order and, consequently, by way of a notice of motion in encl 10 dated 7 November 1994 the respondent — Parkson Corp Sdn Bhd ('Parkson'), sought for at encl 10 of para (3) the following orders:

that Parkson as a respondent to this action be at liberty to:

(a) apply to expunge the registration of the trade mark number 92/07141 in the name of Fazaruddin; and

(b) set aside the order of this honourable court dated 7 July 1994 obtained by Fazaruddin in this action;

(c) have the damages assessed by the registrar.

Fazaruddin deposed that this court had on 23 October 1996 dismissed paras (3)(a), (3)(b) and (3)(c) of encl 10 with costs. But the respondent, so deposed Fazaruddin, was most unhappy with the written decision of this court that was handed down on 23 October 1996 and so the respondent filed a notice of appeal to the Court of Appeal on 21 November 1996. On the date of the hearing of that appeal before the Court of Appeal that was scheduled on 21 November 1997, the respondent had a change of heart and forthwith withdrew the appeal. This meant that the written decision of this court dated 23 October 1996 in regard to encl 10 particularly in regard to

paras (3)(a), (3)(b) and (3)(c) remained intact. Incidentally, it is germane to mention that the written decision of this court dated 23 October 1996 vide *Fazaruddin bin Ibrahim v Parkson Corp Sdn Bhd* had since been reported in the local law journals: [1997] 4 MLJ 360, [1997] 2 CLJ 863, [1997] 2 AMR 1197. It would be ideal to mention that the summons in chambers in encl 38 was nothing more than a consequential order for assessment of damages which the applicant sought as an offshoot of the order of this court dated 23 October 1996. Fazaruddin was quite meticulous and he saw it fit to exhibit the order of this court dated 23 October 1996 as 'FI 2' of encl 37. Fazaruddin deposed that he sustained losses as a result of Parkson using his registered 'ZIG ZAG' trade mark. Fazaruddin also deposed that he had failed to secure tender or contract for the use of the 'ZIG ZAG' trade mark from companies like Berjaya Textiles Berhad and ACTCA Enterprise Sdn Bhd and he exhibited the relevant letters dated 18 November 1996 and 16 January 1997 from these two companies respectively. To appreciate the extent and severity of Fazaruddin's averments, these two letters marked as exhs 'FI 3' and 'FI 4' of encl 37 will now be reproduced. The letter from Berjaya Textiles Berhad was worded as follows:

Berjaya Textiles Bhd

BP/JB/2/96

18 November 1996
M/S Perniagaan Fatama
c/o Fazaruddin bin Ibrahim
12 Jalan Serampang
Taman Pelangi
80400 Johor Bahru

Dear Sir

Re: Deferment of Future Order

We regret to inform you that with immediate effect we would not be able to entertain your business order (which) reasons we are unable to discuss.

However if the matter is resolved sooner, we would be most obliged (if) you could continue (doing) business with us.

We thank you for your (continued) support.

Thank you.

Yours sincerely

sgd (Illegible)
Ong Wee Yap
Operation Manager

while the letter from ACTCA Enterprise Sdn Bhd was worded in this way:

Actca Enterprise Sdn Bhd

Your ref: BP/A765/JDate: 16th January 1997

Perniagaan Fatama
12 Jalan Serampang
Tmn Pelangi
Johor Bahru

Dear sir

Re: Deferment of order

We refer to the above

We wish to inform you that our company has decided to postpone hiring your business permit 'zig zag' due to unavoidable circumstance(s). As a result of that we are also unable to proceed with the fabrication and printing of the following item(s) as ordered by our clients.

Ordered item(s):

(A) Textile

(B) T shirt

(C) Sport attire

We shall inform you accordingly if there is any change of plan.

Yours faithfully
sgd (illegible)
Ho Kim Tat
Manager

From the tenor of these two letters, both the two companies were reluctant to conduct and transact business ventures with Fazaruddin. ACTCA Enterprise Sdn Bhd was more blunt when it decided to put in abeyance the 'hiring' of Fazaruddin's business permit for 'ZIG ZAG' trade mark 'due to unavoidable circumstance(s).' Parkson's usage of the 'ZIG ZAG' trade mark belonging to Fazaruddin must have 'frightened off' these two companies from doing business with Fazaruddin. That would be the direct consequence of Parkson's manoeuvring. It was the unkindest cut of them all.

Reverting back to encl 37, Fazaruddin deposed that in 1993 he had ordered 3,000 jackets bearing the 'ZIG ZAG' trade mark from a company known as Action Gear Sdn Bhd. But Fazaruddin did not take delivery of those jackets worth RM377,964 because the market by then was flooded with the 'ZIG ZAG' trade mark products and there were shops that were sceptical about the authenticity of the products that bore the 'ZIG ZAG' trade mark. Since Fazaruddin did not take delivery of those jackets nor pay for them, Action Gear Sdn Bhd threatened to institute civil proceedings against Fazaruddin. By letter dated 25 September 1993, Action Gear Sdn Bhd framed their demand in this way (see exh 'FI 7' of encl 37):

Action Gear Sdn Bhd

25 September 1993

Encik Fazaruddin Bin Ibrahim
12 Jalan Serampang
Taman Pelangi
80050 Johor Bahru
Johor Darul Takzim

Tuan,

Per: Tuntutan kerugian

Lanjutan daripada surat kami bertarikh 16 Ogos 1993, kami merasa amat kecewa di atas tindakan pihak tuan yang mengabaikan kepentingan kami.

Oleh itu kami terpaksa membuat tuntutan atas kerugian yang diakibatkan oleh pihak tuan sebagai berikut:

(1)	Nilai Jaket	RM360,000.00
(2)	Sewaan Gudang (Jun-Sept)	RM 2,400.00
(3)	'Bank Interest & Charges' (Jun-Sept)	RM 11,664.00
(4)	'Handling Charges'	RM 3,900.00
	JUMLAH	RM 377,964.00

Tuan dikehendaki menjelaskan tuntutan tersebut dalam tempoh 30 hari dari tarikh surat ini. Sekiranya tuan gagal menjelaskan tuntutan ini dalam masa yang ditetapkan, kami tidak akan teragak-agak untuk mengambil tindakan guaman terhadap tuan.

Sekian terima kasih.

Yang benar,

ACTION GEAR SDN BHD
Sgd (Illegible)

Mohsi Arsam
Pengarah Urusan

Fazaruddin deposed that he verily believed that Parkson had profited from the use of the 'ZIG ZAG' trade mark since 1987. Fazaruddin adverted to and made reference to an affidavit of Yong Boon Sen in encl 9 that was affirmed on 1 November 1994 and that affidavit was exhibited and marked as 'FI 8' in encl 37. In fact, Yong Boon Sen's affidavit was referred to and placed prominence by me in my written judgment dated 23 October 1996. This was what I said (at pp 370–371):

> Parkson through the affidavit of Yong Boon Sen in encl 9 sought to introduce evidence of usage. It was deposed by Yong Boon Sen that Parkson began using the mark in 1987 and that Parkson's approximate annual value of sales of its garments using the said mark came to a staggering figure calculated from December 1987 to June 1994. That figure was listed by Yong Boon Sen as follows:

Year		Value
December 1987-June 1988	...	RM 89,550
July 1988-June 1989	...	RM 245,963
July 1989-June 1990	...	RM 180,860
July 1990-June 1991	...	RM1,374,244
July 1991-June 1992	...	RM1,440,739
July 1992-June 1993	...	RM1,081,253
July 1993-June 1994	...	RM1,009,369

Sample copies of invoices from Parkson's various contract manufacturers of articles of clothing bearing the mark commencing 14 October 1987 were exhibited and marked as exh P2. Sample copies of advertisements for clothing bearing the same mark were also exhibited and Yong Boon Sen deposed that they had samples as far back as 1987, but on careful scrutiny the advertisements went only as far back as 24 February 1989 (see p 38 of exh P3 in encl 9). Parkson was said to have incurred expenses and had spent a considerable amount of money for promoting and advertising their 'ZIG ZAG' brand of clothing. The breakdown figure in typewritten form was exhibited as P7 and it is interesting to note that the earliest date shown in that typewritten form was 10 June 1989. All in, the advertising expenses incurred by Parkson amounted to RM142,158.30. Yong Boon Sen deposed further that the extensive sales and promotional exercises by Parkson had made the mark distinctive and referable to Parkson and no one else. The 'ZIG ZAG' device was not distinctive to Fazaruddin, so said Yong Boon Sen in his affidavit. The registration of the mark by Fazaruddin was said to offend s 14 of the Act. What was of crucial importance was the averment by Yong Boon Sen in encl 9 to the effect that Parkson 'is the common law proprietor of the 'ZIG ZAG' mark with an oval device containing the words 'Rugged Wear' which mark was designed/conceived in-house'. Unfortunately, Fazaruddin was not accorded the opportunity of cross-examining Yong Boon Sen and this greatly impeded Fazaruddin.

No wonder the market was flooded with the 'ZIG ZAG' trade mark products. Parkson was making hay 'while the sun shines'. Parkson took advantage of the situation and conveniently flooded the market with 'ZIG ZAG' trade mark products at the expense of Fazaruddin. In short, Parkson seized the golden opportunity to make hefty profits. It was for these reasons that Fazaruddin sought for the orders as listed in encl 38.

Law Boon Eng deposed an affidavit in reply in encl 39 that was affirmed on 1 September 1998 and it was done in response to the affidavit of Fazaruddin in encl 37. Law Boon Eng affirmed the affidavit in reply in his capacity as the general manager of Parkson and he deposed that he was authorized to make and affirm that affidavit on behalf of Parkson. Law Boon Eng also deposed that what he affirmed was based on the facts which were within his personal knowledge or from the records of Parkson of which he had access. Law Boon Eng deposed that he was advised by Parkson's solicitors and he verily believed that Fazaruddin's summons in chambers in encl 38 was misconceived in law and in fact for the following reasons:

(i) that the trade description order dated 7 July 1994 did not provide for damages nor for an assessment of damages;

(ii) that there were no provisions under the Trade Descriptions Act 1972 for an award of damages and/or for an assessment of damages;

(iii) that this court did not have the jurisdiction to award damages and/or assessment of damages as it was functus officio in that the matter had been fully concluded.

Law Boon Eng rounded up by saying that all the allegations of Fazaruddin in encl 37 were expressly denied and have no relevance to these

proceedings. For these reasons, Law Boon Eng prayed that the summons in chambers in encl 38 be dismissed with costs.

To the heart of the matter

Mr M Nathan assisted by Mr Brian Komathi argued well for Fazaruddin. While Mr DP Naban argued for Parkson and, as usual, both parties tried their level best to outwit the other. Mr DP Naban too performed well at the bar.

At the outset, I must categorically say that it was wrong to argue that my written judgment dated 23 October 1996 was all encompassing and covered encl 38. On the contrary, that written judgment revolved entirely on encl 10 with particular emphasis on paras 3(a), (3)(b) and (3)(c) thereof. Mr M Nathan rightly submitted that he was not setting aside the order of this court dated 23 October 1996 and neither was he trying to vary nor re-open encl 10. Indeed what Mr M Nathan was seeking for Fazaruddin was simply an assessment of damages in favour of Fazaruddin which must naturally flow because as a registered proprietor of the 'ZIG ZAG' trade mark with the Registrar of Trade Marks on 9 October 1992, Fazaruddin must be protected and any loss of use by him of the 'ZIG ZAG' trade mark must be compensated by way of damages — be it general or special. The application in encl 38 was simply for an order that damages be assessed in favour of Fazaruddin and this was never decided by me in my written judgment dated 23 October 1996.

Mr DP Naban drew my attention to encl 10 especially the prayers at paras (3)(a), (3)(b) and (3)(c) respectively and he said that it was supported by an affidavit of Yong Boon Sen in encl 9 and opposed by an affidavit of Fazaruddin in encl 13. As a result of my written judgment dated 23 October 1996, an order had been extracted and this can clearly be seen in encl 36 which was worded in this way:

> Perintah
>
> USUL INI dikemukakan untuk menyampaikan keputusan pada hari ini dengan kehadiran Cik Menecka, peguam bagi pihak pemohon dan En Tai Foong Lam, kaunsel bagi pihak responden yang dinamakan di atas DAN SETELAH MEMBACA notis usul bertarikh 7 November 1994 (kandungan No 10), Afidavit Fazaruddin bin Ibrahim yang diikrarkan pada 7 Mei 1994, afidavit Yong Boon Sen yang diikrarkan pada 1 November 1994, afidavit jawapan pemohon yang telah diikrarkan oleh Fazaruddin bin Ibrahim pada 6 Mac 1995, afidavit jawapan Law Boon Eng yang diikrarkan 2 Mei 1995, afidavit jawapan terakhir pemohon terhadap afidavit responden yang diikrarkan oleh Fazaruddin bin Ibrahim pada 29 Jun 1995, afidavit Law Boon Eng yang telah diikrarkan pada 17 Ogos 1995, afidavit Law Boon Eng yang telah diikrarkan pada 7 Disember 1995, afidavit jawapan pemohon yang telah diikrarkan oleh Fazaruddin Bin Ibrahim pada 19hb Januari 1996 dan afidavit Law Boon Eng yang telah diikrarkan pada 15 Mac 1996 dan semuanya difailkan di sini ADALAH DIPERINTAHKAN bahawa perenggan 3 (a), (b) dan (c) di dalam notis usul bertarikh 7 November 1994 tersebut hendaklah ditolak dengan kos.
>
> Bertarikh pada 23 haribulan Oktober, 1996.

tt
Penolong Kanan Pendaftar
Mahkamah Tinggi, Johor Bahru

Perintah ini difailkan oleh Tetuan Lee Hishammuddin, Tingkat 16, Wisma HLA, Jalan Raja Chulan, 50200 Kuala Lumpur, peguamcara bagi pihak responden yang dinamakan di atas. (Tel No 2011681/Faks No 2011746) (IS/9088/96/TS) (A 9088-TS/B)

and using encl 36 as a leverage, Mr DP Naban argued that the order had been perfected and there was nothing to show in that order that Fazaruddin was entitled to damages. But Mr DP Naban overlooked one very important ingredient of that order. It was this. That that order focussed on encl 10 and nothing else. Incidentally that order was filed by the law firm of Messrs Lee Hishammuddin where Mr DP Naban is currently attached to as a partner.

Another interesting factual matrix to consider would be this. In encl 13, Fazaruddin sought at para 19 the following prayers:

Oleh yang demikian, pihak kami dengan rendah hati memohon mahkamah yang maha mulia ini supaya membuat peruntukan-peruntukan seperti berikut:

(a) permohonan responden ditolak dengan kos.

Tuntutan balas

(a) Timbalan pendaftar mahkamah yang mulia ini mengambil kira akaun antara Responden-responden dengan pemohon sebagaimana wajar.

(b) Gantirugi dan kerugian akibat penyalahgunaan logo dagangan pemohon oleh Responden dan ditaksirkan oleh timbalan pendaftar mahkamah yang mulia ini dan dibayar oleh responden-responden kepada pemohon-pemohon.

(c) Kos guaman ini.

(d) Lain-lain relif yang difikirkan sesuai dan manfaat oleh mahkamah yang mulia ini.

and somehow Mr DP Naban magnanimously agreed that I 'did not deal with encl 13' (see p 15 of the notes of evidence) in my written judgment dated 23 October 1996. That being the case, I was still free to consider encl 38 since the prayers therein were in pari materia with that of para 19 of encl 13 — where the focal point of similarity was in regard to the assessment of damages in favour of Fazaruddin. This was my judgment and I so hold accordingly.

An argument was advanced to the effect that the principle of functus officio should be vigorously applied in favour of Parkson and when so applied, so the submission went, the summons in chambers in encl 38 should be dismissed with costs. By way of an analogy reference should be made to the case of *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642, a decision of the then Supreme Court where the facts were in regard to the setting aside of an order for sale of a charged land by the intervener. The issue which the then Supreme Court had to answer was whether the judge was functus officio in setting aside the order for sale of the charged land in favour of the intervener where the said land

was successfully sold by public auction and the full purchase price had been paid and the registrar had issued the certificate of sale to the successful bidder. Harun Hashim SCJ speaking for the then Supreme Court held that the principle of functus officio would apply and the judge had no power to set aside the order for sale of the charged land in favour of the intervener. This was what his Lordship said at pp 648–649 of the report:

> The application to intervene in the present proceedings was not made until a week after the issue of the certificate of sale by which time the auction sale was completed. The learned judge was clearly functus officio by then. Indeed, following *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, the learned judge was functus officio after he made the order for sale on 29 August 1988. In the *Hock Hua* case, the allegations of fraud and forgery were made after the judge had made the order for sale but before the auction sale and the Federal Court held that the judge was functus officio after he made the order for sale in foreclosure proceedings when the order had been drawn up and perfected. True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a final order unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is functus officio and therefore has no power to set aside the order for sale.

and his Lordship was perfectly right in adjudicating the issue in that way. Here unlike there, encl 38 was not adjudicated upon by me in my written judgment dated 23 October 1996. Here, Fazaruddin merely sought for damages to be assessed in encl 38 whereas in encl 10 this court dealt with Parkson's prayers at paras (3)(a), (3)(b) and (3)(c). Both these two enclosures were far apart from one another and totally different in its scope and ambit. The principle of functus officio should not be invoked to deprive Fazaruddin of his legal right to seek damages against the recalcitrant Parkson. Fazaruddin was not seeking to vary the order of this court dated 23 October 1996; on the contrary Fazaruddin was merely seeking an ancillary order for damages to be assessed in his favour in encl 38. *Kerly's Law of Trade Marks And Trade Names* (11th Ed) by TA Blanco White and Robin Jacob, 1983 version contained passages which should be referred to as they would add flavour to Fazaruddin's summons in chambers in encl 38. At p 293, the learned authors spoke of the types of reliefs in these trenchant terms:

> If the plaintiff succeeds in an action for infringement, he may obtain an order for: (i) an injunction restraining further infringements of his rights; (ii) the delivery up for the destruction, or for the erasure of the marks, of any goods already marked with the spurious mark and in the possession or under the control of the defendant, as well as of deceptive labels, advertising material, etc; (iii) and an inquiry as to damages in respect of the past infringement, or in lieu, an account of the profits made by the defendant by the sale of the spuriously marked goods, or for some one or more of these.

Later at p 303, the learned authors said:

> Damages are a matter of right; the account of profits is an equitable remedy and the court has a discretion whether or not to grant it. Accordingly, a

> successful plaintiff in an infringement action is entitled to an inquiry as to damages ... .

In the *Malaysian Court Forms In Civil Proceedings*, a 1998 version published by Malayan Law Journal Sdn Bhd, at para 15116 thereof certain salient passages appearing therein merit reproduction and these passages too would greatly assist this court in adjudicating encl 38. The passages were worded in this way:

> While the court will exercise, with care and circumspection, its power to decide that the separate issues of liability and damages should be tried separately, yet the court should be ready to order separate trials of the issues of liability and damages whenever it is just and convenient to do so (*Coenen v Payne* [1974] 2 All ER 1109, [1974] 1 WLR 984). Where the question as to the amount of damages is of such a nature that it will be more convenient to refer it to a registrar, the court may order the question of liability to be heard separately and the question of damages to be postponed until the conclusion of the former (*Smith v Hargrove* (1885) 16 QB D 183).

In the *Malaysian Court Practice (High Court)* at para 33.2.5, at p 2296, the following passages appeared:

> Where the issue of liability is separate and distinct from the issue of damages which seems set to be a complex and lengthy hearing, the determination of the latter may in certain circumstances be held separately and not jointly with the determination of liability, ie after the question of liability has been decided as a preliminary matter: *Coenen v Payne* [1974] 1 WLR 984; *Smith v Hargrove* (1885) 16 QBD 183. See further *Hawkins v New Mendip Engineering* [1966] 3 All ER 228 at 233 (postponing the assessment of damages for a period of time to enable a better prognosis of plaintiff's condition in a personal injury case) and *Healey v A Waddington & Sons Ltd* [1954] 1 All ER 861 (CA) (order directing consolidation of several actions arising out of same accident up to liability but allowing each plaintiff's claim to damages to be assessed separately).

In *Arab Malaysian Finance Bhd v Badiaddin bin Mohd & Anor* [1996] 3 MLJ 621, the Court of Appeal had to consider an application to set aside an order for sale of the land made to the same High Court that made the order, but presided over by a different judge in the context of the principle of functus officio. The Court of Appeal too had to consider the question of whether one High Court could set aside the final order of another High Court or its own final order in the context of the principle of functus officio. Shaik Daud JCA speaking for the Court of Appeal said at pp 625–626 of the report:

> Let us pause at this point to say that without going into the merits of the second order, we would have thought that the proper course for the respondents to adopt, if they find themselves unhappy with that order, would be to appeal to the (then) Supreme Court, as at that time that was the only court that could declare as being invalid or otherwise any order of the High Court. As mentioned earlier, they in fact did appeal to the then Supreme Court but their appeal was struck off since they failed to obtain leave to appeal beforehand. Since their appeal was only struck off and not dismissed, the proper course then would be to have made a fresh application for leave with

all consequential orders. Instead, the respondents applied by summons in chambers praying for the Seremban High Court to set aside its own order. It is settled law that one High Court cannot set aside a final order of another High Court, let alone its own final order. It is our view that the Seremban High Court, having rightly or wrongly given the second order, is functus officio, and it cannot set its own order aside. In *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, the learned judge had made an order for sale in foreclosure proceedings. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. There was no appeal against that order. The respondent applied to set aside the judgment which at first was refused, but on a second application it was allowed. On appeal, the Federal Court held that the learned judge was functus officio. At p 144 of the judgment, Chang Min Tat FJ (as he then was) who delivered the judgment held:

> 'Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O 28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court.'

Clearly, the second order is a final order of the Seremban High Court. Therefore, that order cannot be altered, varied or set aside by the same court even though presided over by another judge. Nor does it come under the provision of O 20 r 11 of the Rules of the High Court 1980. The only recourse is to appeal to a higher court which has jurisdiction to pronounce the validity or otherwise of the second order.

and factually speaking the facts in *Arab Malaysian Finance Bhd* were poles apart from the present case. Moreover the decision of the Court of Appeal in that case had been upset by the Federal Court vide *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. Be that as it may, the summons in chambers in encl 38 and the prayers that were sought thereto had not been adjudicated at all and, consequently, the principle of functus officio can never be applied to the factual matrix of the present case. The order of this court dated 23 October 1996 and the written judgment that followed suit were only confined to encl 10 and that too restricted to the prayers at paras 3(a), (3)(b), and (3)(c) thereof. The issue of re-litigation as alluded to in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 (CA) cannot be applied to the factual matrix of the present case. In adjudicating encl 38, there was no question of re-litigation at all.

The case of *Bedwell v Wood* (1877) 2 QBD 626 aptly explained the meaning of functus officio in a language so simple that it ought to be paraphrased. There the court said that the arbiter who has discharged his duty or whose office of authority came to an end can be said to have acted functus officio. Translated to the present case, it cannot be said that I had discharged my duty in regard to encl 38 and, that being the case, my office of authority in so far as encl 38 was concerned had not come to an end at all.

In *United Asian Bank Bhd v Elgi Marka Sdn Bhd* [1995] 1 MLJ 301, the court had to deal with an application to set aside an order for sale in the

context of the principle of functus officio and the court held that it was not functus officio because the order for sale was not a regularly obtained order since it was merely a purported order which was plainly null and void. In the present case, the order of this court dated 23 October 1996 remained on record as a regularly obtained order which adjudicated on the prayers at paras (3)(a), (3)(b) and (3)(c) of encl 10 and not encl 38; and this made the present case poles apart from the case of *United Asian Bank Bhd.*

In *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 (FC), counsel for the chargees argued that the ex parte orders had been perfected before the chargors' summons in chambers to set aside had been filed thus rendering the High Court functus officio and Edgar Joseph Jr FCJ delivering the judgment of the Federal Court said at p 381 of the report:

> The rule that the court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except in so far as is necessary, to correct errors in expressing the intention of the court, is subject to certain exceptions, one of which is that an order which is a nullity owing to failure to comply with an essential provision such as service of process, can be set aside by the court which made the order in the exercise of its inherent jurisdiction (see *Craig v Kansen* [1943] 1 All ER 108 (CA), at p 113 applied in *United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546). If, therefore, counsel for the chargors were correct in his contention that the ex parte orders were null and void — a point to which we shall be coming shortly – then the judge was wrong in applying the principle of functus officio to the circumstances of the case before him.

and at p 383, his Lordship said:

> In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the ex parte orders obtained, in consequence, a nullity.

and I must at once say that the present case was not concerned with the issue of the service of process and this clearly differentiated the present case with that of *Muniandy a/l Thamba Kaundan & Anor.* It must be emphasized that in the course of adjudicating encl 10, I did say (at p 369) that:

> As a registered proprietor, Fazaruddin has 'the exclusive right to the use of the trade mark in relation to those goods subject to any conditions, amendments, modifications or limitations entered in the register' as enshrined in s 35(1) of the Act (referring to the Trade Marks Act 1976).

but Parkson had the audacity to use the 'ZIG ZAG' trade mark and had profited from it to the tune of, according to Yong Boon Sen, a staggering sum of RM1,009,369 between July 1993 to June 1994. No wonder Fazaruddin found, to his dismay, that the market was flooded with the products bearing the 'ZIG ZAG' trade mark to such an extent that shopkeepers were sceptical about the authenticity of Fazaruddin's products bearing the 'ZIG ZAG' trade mark. No right thinking citizens would want to be in the shoes of Fazaruddin. It was simply unthinkable. Damages

would be the right and the best remedy for Fazaruddin and this was what he sought for in encl 38 (*Cho Heng Rice Vermicelli Factory Co Ltd v Rifetra Sdn Bhd* [1997] 2 AMR 1767).

The issue of liability can certainly be separated from the issue of damages. In *Polskie, etc v Electric Furnace Co Ltd* [1956] 2 All ER 306, Jenkins LJ favoured the trial of liability to be separated from the question as to damages and Hodson LJ agreed with this approach. At pp 309–310 of the report, Jenkins LJ had this to say (at pp 309–310):

> To put it at its shortest, the action is one in which the plaintiff's claim against the defendants damages for breach of contract. The contract is alleged, repudiation is alleged and the plaintiff's election to treat the contract as discharged by repudiation is alleged. It may be said that nearly all the other issues go to quantum of damages. Once the breach of contract is established, liability is established for the damages, whatever they may be, which have flowed from the breach, and the remaining issues may all, in a sense, be said to be directed to the question of quantum.

At this juncture, it would be opportune to recall the case of *Coenen v Payne & Anor, Payne v Coenen* [1974] 2 All ER 1109 which was alluded to somewhere in this judgment. The facts in *Coenen* were quite interesting. There the plaintiff was a resident of West Germany and was employed by a firm as a veterinary surgeon. The plaintiff was driving a car and while so driving collided into another car driven by the defendant. The collision took place in England and the plaintiff was injured in that collision. The defendant was also injured. The plaintiff instituted an action for negligence against the defendant claiming damages for personal injuries and the plaintiff quantified his loss of earnings for three months. The defendant denied liability and counterclaimed for damages for negligence against the plaintiff. Subsequently the plaintiff amended his statement of claim and by that amendment, the plaintiff sought for damages for future loss of earnings at the rate of £8,000 a year on the footing that before the accident the plaintiff had intended to enter private practice in Germany where he would have earned large sums but, because of his injuries, the plaintiff would have to remain in the employment of his existing employers. The length of the trial was estimated at three days but because of the new issue as to damages it was estimated that it would take a further four or five days and would entail a lot of expenses in the nature of discovery of documents, obtaining evidence from Germany on the plaintiff's professional prospects and on deciding the effect of German tax laws on the claim. The defendant then applied for an order under O 33 r 4(2) of the RSC for separate trials of the issues of liability and damages. On the other hand, the plaintiff opposed the application. As a resident abroad, the plaintiff had given security for the costs of the trial of the action and was prepared to provide additional security provided the issues of liability and damages were tried together. The judge refused to accede to the defendant's application and being aggrieved the defendant appealed. The Court of Appeal allowed the appeal and held that although it should be the normal practice for issues of liability and damages to be tried together, yet the court had the necessary power under O 33 r 4(2) of the RSC to order separate trial of those issues in

personal injury cases and the court should always be ready to do so wherever it was just and convenient. The Court of Appeal was also of the view that having regard to the time and expense which would be involved in trying the issue of damages, the case was therefore a proper case for separate trials where the issue of liability would be tried first and the issue of damages to be followed thereafter. Lord Denning MR at pp 1111–1112 in style said:

> As the judge said, the normal method hitherto has been to try liability and quantum at the same time. It has been the practice not to make an order for separate trials save in exceptional circumstances and on special grounds. Winn LJ's committee said their report (Report of the Committee on Personal Injuries Litigation (Cmnd 3691)), p 139, para 494 (b):
>
> > 'In practice this power has hitherto been exercised only in "extraordinary and exceptional cases" or where "the Judge has serious reason to believe that the trial of the issue will put an end to the action".'
>
> Winn LJ's committee did not like that practice. They thought 'a more robust and less restrictive approach' should be approved. They recommended that a new rule should be made to alter it. In addition to the committee's recommendation, Winn LJ in two cases indicated that separate trials might well have been ordered with advantage. Those were *Hawkins v New Mendip Engineering Ltd* [1966] 3 All ER 228 at pp 232, 233, [1966] 1 WLR 1341 at p 1347 and *Stevens v William Nash Ltd* [1966] 3 All ER 156 at p 160, [1966] 1 WLR 1550 at p 1554. I think the time has come to adopt a new approach. There is no need to order a new rule. The practice can be altered without it. The courts already have power to do it. Order 33 r 4(2) of the RSC, says:
>
> > 'In any [action begun by writ] different questions or issues may be ordered to be tried at different places or by different modes of trial and one or more questions or issues may be ordered to be tried before the others.'
>
> In future the courts should be more ready to grant separate trials than they used to do. The normal practice should still be that liability and damages should be tried together. But the courts should be ready to order separate trials wherever it is just and convenient to do so.
>
> In this case there is this strong point to be made in favour of separate trials. It is the time and expense which will be involved in trying the issue of damages. It will take four or five days to try; witnesses will have to come from Germany and surgeons and experts from London. All will be unnecessary if Dr Coenen should fail. As against that, counsel for Dr Coenen stressed the point of credibility. It was mentioned by Winn LJ's committee (p 137, para 490(a)). A man's credibility on one issue may be affected by his credibility on the other. For instance, if he puts a claim for inflated damages which the judge disbelieves, it may affect his credibility on liability. Vice versa, if he is moderate and restrained on damages, the judge may be impressed by it in deciding on liability. In the present case counsel for Dr Coenen said the judge would have a better opportunity of assessing the credibility of Dr Coenen if he was two days in the witness box rather than two hours. I doubt it. I should think a judge could assess his credibility pretty well in two hours anyway.
>
> At any rate, this seems to me to be a case where the new practice should prevail. It is a proper case for separate trials, the issue of liability being decided first and then afterwards damages. I would allow the appeal accordingly.

In the local context, we have O 33 r 2 of the Rules of the High Court 1980 ('the RHC') which states as follows:

> The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

and it is a time saving device which vests in the court the power to order 'any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law', 'to be tried before, at or after the trial of the cause or matter'. It is indeed a power so wide that the court has practically, at its disposal, the power to decide whether to hear, for instance, the issue of liability separately from the issue of damages or to hear both issues together and at the same time. Ideally, it would be appropriate for the court to explore the facts before allowing a preliminary point of law to be tried first. The reason is quite obvious. Lord Scarman in *Tilling v Whiteman* [1980] AC 1, [1979] 1 All ER 737 was quite blunt when he described preliminary points of law as being 'too often treacherous short cuts. Their price can be delay, anxiety and expense.' Once the judge decides a particular course of action for the conduct of the trial, the judge's decision ought not to be interfered with on appeal unless the decision is plainly wrong (*Ashmore v Corporation of Lloyd's (No 1)* [1992] 1 WLR 446, [1992] 2 All ER 486 (HL)). In order to minimise and, if possible, to avoid difficulties that may crop up later it would be wise for the judge to frame the preliminary question of law carefully and precisely. A precise and perfect framing of the question of law would certainly expedite the trial of the issue. I have the power to order damages to be assessed by the senior assistant registrar ('the SAR') and I must exercise this power for the benefit of Fazaruddin as per his encl 38. A robust approach must be adopted in separating the issue of liability from that of damages. In the context of the present case that would be the 'just and convenient' course of action to adopt, borrowing the speech of Lord Denning MR in the *Coenen*'s case, after all Parkson had profited from the use of the 'ZIG ZAG' trade mark.

The SAR must earn his keep and assess both the general damages as well as the special damages judiciously. The SAR should not wring his hands in desperation and despair at the very thought of assessing damages. It would not be an impossible task to assess damages because in the words of Cockburn CJ in *Simpson v The London & North Western Railway Co* (1876) 1 QB 274 at p 277:

> ... as to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be a matter of speculation, but that is no reason for not awarding any damages at all.

Of course, the SAR must tread cautiously. The SAR must always remember the sage words of Fletcher Moulton LJ in *Chaplin v Hicks* [1911] 2 KB 786 in assessing damages. This was what Fletcher Moulton LJ said in that case (at p 796):

> But in most cases it may be said that there is no recognized measure of damages, and that the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed, would work great wrong.

Indeed it would be wrong not to award damages to Fazaruddin. It is now trite law that the governing purpose of awarding damages is simply to put the party whose rights have been violated in the same position, in so far as money can do so, as if his rights had been observed (*Sally Wertheim v Chicoutimi Pulp Co* [1911] AC 301). Then there is the rule which says that if the aggrieved party were to relentlessly pursue the matter with diligence, it would ultimately provide him with a complete indemnity for all the loss de facto which results from a particular breach notwithstanding that it is improbable or unpredictable. Some may say that it is a harsh and draconian rule.

But, there was nothing improbable or unpredictable in assessing the profits which Parkson had earned while using the 'ZIG ZAG' trade mark by applying the barometer set by Yong Boon Sen in his affidavit in encl 9 and from there the damages, both general and special, shall flow and should be computed with reasonable fairness.

Restitutio in integrum. It cannot be denied that Fazaruddin has suffered damage and so he must, in so far as money can resolve it, be restored to the position he would have been enjoying had that particular damage not occurred (*Robinson v Harman* (1848) 1 Ex 850; *Sally Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at p 307; *The Edison* [1932] P 52 at pp 62–63; and *B Sunley & Co Ltd v Cunard White Star Ltd* [1940] 1 KB 740 at p 745, [1940] 2 All ER 97 at p 100). In the realm of assessment of damages, the SAR has the absolute discretion to adjudicate the matter without fear or favour.

Reverting back to the principle of functus officio, the decision of the Federal Court in the case of *Badiaddin bin Mohd Mahidin & Anor* should be referred to. There the Federal Court had to deal with the potent issue of whether a judge of the High Court has the inherent jurisdiction to set aside an order emanating from another judge of the High Court whose order has contravened any written law. Mohd Azmi FCJ, at pp 412–413, delivering a separate judgment said aptly:

> To summarize, Mohd Noor Abdullah J was correct in law in exercising the inherent jurisdiction of the High Court to set aside ex debito justitiae the October 1990 order of Mustapha Hussain J for the following reasons. The third party charge having been lawfully declared invalid by the High Court in 1988 by virtue of s 8(i) of the Enactment, the principle order made in 1990 for restitution of benefits or compensation against the appellants which in effect was an order to enforce an invalid third party security for repayment of loan purportedly decreed under s 66 of the Contracts Act 1950 was made without or in excess of jurisdiction, and in consequence, the order of sale of the appellant's land could not be sustained. Secondly, the sale order itself was in effect an order of execution to satisfy a judgment by the sale of the

reservation land by public auction or private treaty (which should be construed in the circumstances as an order of attachment in execution of the said judgment) and therefore contravened the prohibition imposed by s 13 of the Enactment, a legislation especially permitted and protected by art 89 of the Federal Constitution not only relating to reservation land existing before Merdeka Day, but also in respect of new reservation land.

If counsel in the court below had been more persuasive in the legal concept of ex debito justitiae, I would venture to say that the Court of Appeal would have concluded that Mohd Noor Abdullah J had the necessary jurisdiction to exercise his discretion to set aside the order of Mustapha Hussain J dated 8 October 1990, and that the principle of functus officio or res judicata could not in any way defeat the inherent jurisdiction of the court to do justice in this particular case.

Peh Swee Chin FCJ delivered a separate judgment and his Lordship said at p 417 of the report:

> When a judgment in the High Court has been perfected in the manner described in the above passage, a party to the judgment generally and subject to the same passage, or any other written law, and apart from any appeal, cannot reopen the matter finalized in the judgment by seeking to alter it or amend it for the court would be functus officio by virtue of the ratio of *Hock Hua Bank v Sahari bin Murid* [1981] 1 MLJ 143.

Gopal Sri Ram JCA who sat in the Federal Court also wrote a separate judgment and at p 426 of the report his Lordship said:

> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v Robertson* [1985] AC 97 is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.

and his Lordship rounded up the matter by saying at p 429 of the report:

> It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory, which, upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case.
>
> It follows from what I have said thus far upon the topic under discussion that Mohd Noor Abdullah J had ample power and jurisdiction to grant the declaration in question and to set aside the order made by his predecessor. The Court of Appeal therefore fell into error by declining to enter upon the

merits of the case and in deciding the appeal before it entirely on the ground that the High Court was functus officio. A

I must at once say that the order of this court dated 23 October 1996 and the written judgment which had since been reported did not breach any written law. It was made pursuant to encl 10 particularly in regard to paras (3)(a), (3)(b), and (3)(c). I had the 'power and the jurisdiction' to hear encl 10 and adjudicate upon it and the judgment that flowed from it was a regular judgment and should be respected by all parties. I am in total agreement with Peh Swee Chin FCJ in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC) especially that part of the decision of his Lordship in regard to the issue of res judicata. At p 197 of the report, his Lordship summarized the law in these fine words: B C

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. D

but a word of caution must be added when applying that principle to the facts of the present case. I found and it was part and parcel of my judgment that the order of this court dated 23 October 1996 was only confined to encl 10, prayers (3)(a), (3)(b) and (3)(c) thereof. That order did not adjudicate on encl 38 and so the 'matter between the two parties' in so far as encl 38 was concerned had not 'been adjudicated by a court of competent jurisdiction'. That being the case, I was thus empowered to hear encl 38. It was my judgment and I so hold that Fazaruddin was entitled to succeed in his summons in chambers in encl 38 and I, unhesitantly, gave judgment to him in regard to the whole of encl 38 with costs. I also ordered that the SAR to assess the general damages as well as the special damages which Fazaruddin had, all these years, incurred. It can be summarized, from the available evidence, that Fazaruddin as the registered proprietor of the 'ZIG ZAG' trade mark deserved to succeed in his application in encl 38. With respect, Parkson — the schemer and the opportunist, who had profited by using the 'ZIG ZAG' trade mark must be held accountable in the context of encl 38. This was my judgment and I so hold accordingly. E F G

Application allowed.

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Reported by Jafisah Jaafar

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